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In the Supreme Court of the United States

October Term, 1957

EMIL WENTZ AND WILLIAM BERING JENSEN,

PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 244 F. 2d 172.

JURISDICTION

The judgment of the Court of Appeals was entered April 19, 1957 (Pet. App. 10). A petition for rehearing was denied May 31, 1957 (Pet. App. 10). The petition for a writ of certiorari was filed July 1, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a telegram sent from California to Mexico, which was sent via Texas where it was recorded and sent on, was transmitted "by means of interstate wire" within the purview of 10 U.S.C. 1343, as enacted in 1952 before its amendment in 1956.

STATUTE INVOLVED

18 U.S.C. 1343, as enacted July 16, 1952, 66 Stat. 722, provided:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.[1]

STATEMENT

Petitioners were convicted in the United States District Court for the Southern District of California under an indictment charging that on November 22, 1955, in execution of a scheme to defraud they "caused to be transmitted by means of interstate and foreign wire a signal and sound from the City and County of Los Angeles, California * * * to Dallas,

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[1] The statute was amended on July 11, 1956, 70 Stat. 523, to punish representations, etc. "transmitted by means of wire, radio, or television communication in interstate or foreign commerce".

Texas, thence to San Antonio, Texas, and thence to Mexico * * *" (R. 3-6). Each defendant was sentenced to imprisonment for five years and to pay a fine of $1,000 (R. 31-32). On appeal, the judgments were affirmed.

The only issue raised is whether the telegram which formed the basis of the indictment was "transmitted by means of interstate wire", within the purview of 18 U.S.C. 1343, as it read at the time of the crime before the 1956 amendment added transmissions in foreign commerce to the coverage of the statute. The message was sent from Los Angeles to Mexico City by Western Union which has no direct lines from California to Mexico City. A message is normally sent, as this was, from Los Angeles to Dallas, Texas, where an automatic machine makes a reperforation on tape. It is then sent to San Antonio and from there by Mexican lines into Mexico City. At San Antonio a full copy is made of the message before it is retransmitted over Mexican lines (R. 63-65).

Petitioners objected to the portion of the judge's charge which instructed the jury that a telegram was within the purview of the statute "if sent by a wire which crosses state lines, whatever may be its destination" (R. 91-92).

ARGUMENT

The evidence in this case was that the telegram in question was transmitted by wire from California to Texas where it was twice reproduced in a tangible form before being forwarded, again by wire, to Mexico City (*supra*, this page). This procedure was

necessary because there was no direct line from California to Mexico City. Thus the facts bring the case within the literal terms of 18 U.S.C. 1343, since the message was "transmitted by means of interstate wire."

The petitioners argue that, since the ultimate destination of the telegram was Mexico City, the transmission was foreign rather than interstate (Pet. 5-7). There might be a basis for this position had the message proceeded directly from California to Mexico, or had it passed through Texas without interruption. Here, however, it is undisputed that there was first a transmission of the message to Texas and then a retransmission from Texas to Mexico City. Therefore the petitioners' argument has no application to the facts of this case.

The petitioners also argue that the statute (*supra*, p. 2) is to be interpreted so that the words "interstate wire" are part of a single phrase with the word "communication" to read "interstate wire communication"; that this term is defined by Section 3(e) and (f) of the Federal Communications Act of 1934 (the 1952 amendments of which included this section, 66 Stat. 711) to require a receipt of the message in Texas and to exclude a foreign communication; and that the trial court's instructions to the jury covered a transmission through Texas to a foreign destination without regard to any receipt in Texas. This argument depends on reading the words "wire" and "communication" as a single phrase, an interpretation not required by the language. Unless the statute is so read there is no occasion to turn to the definitions of

the Communications Act.[2] Moreover, even assuming petitioners' interpretation, on the basis of the instructions given by the trial court, the jury could not have convicted without in fact finding that there was a receipt of the message in Texas, since the only evidence introduced by the government of any type of interstate transit was dependent on the transmission through Dallas, Texas. Therefore, to find interstate transmission at all, the jury must have accepted the evidence of transmission to Texas and retransmission to Mexico.

In any event, whatever the correct interpretation of the statute as it was before the 1956 amendment, Congress has now changed the law so that foreign as well as interstate commerce is specifically covered. This deprives the issues raised by the petition of any importance for future cases. There is no conflict and no need for further review by this Court.[3]

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[2] The definitions involved are designed to apply to the regulatory system set up by the Act. The section of the law here in question was originally passed by the House as a separate bill and incorporated into the Communications Act in the Senate. It was intended by both houses "to establish for radio a parallel provision now in the law for fraud by mail." S. Rep. No. 44, 82d Cong., 1st Sess., p. 14; H. Rep. No. 388, 82d Cong., 1st Sess., p. 1. Under the mail fraud law even incidental use of the mails has been held sufficient to establish federal jurisdiction. *United States* v. *Young*, 232 U.S. 155. It therefore seems unlikely that Congress intended the technical definitions applicable to the regulatory phase of the statute to limit the scope of the fraud provision.

[3] Petitioners ask for admission to bail pending action on the petition (Pet. 14). After the affirmance of the conviction, the district court revoked its order admitting petitioners to bail. Petitioners made a motion for restoration to

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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bail. After a hearing, the district court denied the motion "entirely upon the possibility of this defendant absconding" (R. 115). The Court of Appeals, after a denial of a petition for rehearing, ruled that on the record it should not overturn the district court's conclusion that there was danger of flight (R. 134-135). Certainly the possibility of flight was a proper matter for consideration by the district court, whose conclusions should not be disregarded. See opinion of Mr. Justice Frankfurter in *Ward* v. *United States*, 76 S. Ct. 1063.